

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:)	
)	
CONSUMER BANKERS ASSOCIATION)	CG Docket No. 02-278
)	
Petition for Expedited Declaratory Ruling with)	
Respect to Certain Provisions of the Indiana)	
Revised Statutes and Indiana Administrative Code)	

**The State Of Indiana's Motion To Dismiss
The Consumer Bankers Association's Petition On Grounds Of Sovereign Immunity**

Pursuant to 47 C.F.R. §1.41, the State of Indiana hereby moves the Commission for dismissal of the Consumer Banker's Association's Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised States and Indiana Administrative Code. The CBA's Petition is jurisdictionally barred by the Eleventh Amendment. The State is not, by filing this motion, submitting itself to the jurisdiction of the Commission, and it expressly reserves the right to argue the merits of the dispute in a later filing before the Commission or in an appropriate forum.

Respectfully submitted,

STEVE CARTER
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By: /s/ Thomas M. Fisher
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**Memorandum In Support Of The State Of Indiana’s Motion To Dismiss
The Consumer Bankers Association’s Petition On Grounds Of Sovereign Immunity**

In its November 19, 2004, Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code (“Petition”), the CBA asks the Commission to preempt Indiana’s Telephone Privacy Act and related regulations to the extent that they prohibit interstate telemarketing calls to persons with whom the caller has an “established business relationship,” as that term is defined by the Commission’s rules. (CBA Petition at 1.) The Petition, however, in effect attempts to drag the State of Indiana unwillingly into a federal regulatory tribunal and furthermore asks that federal tribunal to declare an Indiana law null and void in some respect. It is therefore barred by the Eleventh Amendment and related state sovereign immunity. Accordingly, the Attorney General respectfully requests that the Commission dismiss the CBA’s petition.

ARGUMENT

The fundamental principle of sovereign immunity bars the CBA from filing a petition for adjudication before an administrative agency that would result in a ruling adverse to the State. The purpose of the doctrine of sovereign immunity is to accord to the States the respect owed to them as sovereign entities as reflected in, but not limited by, the Eleventh Amendment. *Fed.*

Maritime Comm’n v. S. C. Ports Auth. 535 U.S. 743, 765-66 (2002). The Eleventh Amendment presupposes that each state is a sovereign entity and is inherently not subject to suit without the state's consent. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). The Eleventh Amendment “confirmed rather than established, sovereign immunity as a constitutional principle.” *Alden v. Maine*, 527 U.S. 706, 728-29 (1999). Further, the Eleventh Amendment “serves to avoid ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.’ ” *Seminole Tribe* at 58. (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

In *Federal Maritime Commission*, the Court extended sovereign immunity to cover administrative proceedings brought by a private party against a non-consenting agency of a state. The Court observed that the Constitution’s framers did not intend to subject States to proceedings “anomalous and unheard of when the constitution was adopted.” 535 U.S. at 755 (quoting *Hans*, 134 U.S. at 18). The Court further reasoned that “if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency” *Id.*, 535 U.S. at 760. After observing the similarities between administrative and civil proceedings, the Court concluded that sovereign immunity applied to protect States from administrative adjudications. *Id.* The Court also ruled that Congress could not conduct an end-run around sovereign immunity by authorizing Article I administrative tribunal to adjudicate matters that are not allowed in an Article III court. *Id.* at 761.

The CBA seeks to subject the State of Indiana to the coercive process of the Commission, hoping to prohibit Indiana from enforcing its own law. It has even predicated the FCC’s

jurisdiction in this matter on that portion of the APA that authorizes adjudicatory proceedings, 5 U.S.C. § 554. (*See* CBA Petition at 1.) This source of jurisdiction makes sense because, in response to the CBA's petition, the Commission would act as a panel of judges, interpreting both State and federal law and making a declaration as to the validity of Indiana's statute.

Furthermore, while the Commission's order would not be self-executing, the nature of the proceeding nonetheless means that allowing it to move forward would be highly coercive to Indiana, thereby impinging its sovereignty and contravening the plan of the Convention. *Id.* at 760-61. In short, Indiana must defend itself before the Commission or compromise its ability to defend its telephone privacy statute when the petitioner seeks to enforce a favorable Commission ruling in federal district court. Indeed, if the Commission were to rule in favor of the CBA, Indiana, in order to protect its ability to enforce its law, would have to appeal that ruling to a federal circuit court, pursuant to 28 U.S.C. §2342, or risk forfeiting any right to challenge the Commission's ruling. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). And in order to be able to appeal the FCC's decision to a federal circuit court, Indiana must first participate in the FCC proceeding (or later petition the FCC for reconsideration). *See, e.g., Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1366 (11th Cir. 2002). These requirements underscore the adjudicatory nature of this proceeding and demonstrate why it is governed by the holding in *Federal Maritime Commission*.

Nor do any of the exceptions to the sovereign immunity defense apply. Indiana has not expressed a "clear declaration" that it is waiving its sovereign immunity (*see, e.g., Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *College Sav. Bank v. Fla. Prepaid Postsecondary Edu. Expense Bd.*, 527 U.S. 666, 675-76 (1999)), and Congress has not even purported to abrogate sovereign immunity in this area (much less would there be a Fourteenth

Amendment basis for doing so). *See Seminole Tribe*, 517 U.S. at 56 (abrogation requires unequivocal statutory language). While *Ex Parte Young*, 209 U.S. 123 (1908), permits federal courts to enjoin or declare unlawful ongoing federal law violations by particular state officials, the petition seeks a general declaration of state law preemption, not an injunction against a specific state official to stop an ongoing federal law violation, so it does not qualify for the *Young* exception.

CONCLUSION

For the foregoing reasons the FCC should dismiss the Consumer Bankers Association's Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised States and Indiana Administrative Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MOTION TO DISMISS** was filed electronically and served upon all counsel of record listed below, by United States Mail, first-class, postage prepaid, and email on the 24th day of January, 2005:

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